



Court File No. **MLC-S-S-2111137**
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

Sharon K [REDACTED]; Veronica S [REDACTED]; Erica R [REDACTED], a minor, by her litigation guardian Stephanie R [REDACTED]; and the Canadian Constitution Foundation

PETITIONERS

AND:

Dr. Bonnie Henry in her Capacity as Provincial Health Officer for the Province of British Columbia and Attorney General of British Columbia

RESPONDENTS

PETITION TO THE COURT

ON NOTICE TO: Attorney General of British Columbia
c/o Deputy Attorney General
Ministry of the Attorney General
11th floor, 1001 Douglas Street
Victoria BC, V8X 1X4

Dr. Bonnie Henry, Provincial Health Officer
4th Floor, 1515 Blanshard Street
PO Box 9648 Stn Prov Govt
Victoria BC V8W 9P4

This proceeding has been started by the Petitioner for the relief set out in Part 1 below.

If you intend to respond to this petition, you or your lawyer must

- (a) file a response to petition in Form 67 in the above-named registry of this court within the time for response to petition described below, and
- (b) serve on the petitioner(s)
 - (i) 2 copies of the filed response to petition, and
 - (ii) 2 copies of each filed affidavit on which you intend to rely at the hearing.

Orders, including orders granting relief claimed, may be made against you, without any further notice to you, if you fail to file the response to petition within the time for response.

Time for response to petition

A response to petition must be filed and served on the petitioner (s),

- (a) if you were served with the petition anywhere in Canada, within 21 days after that service,

- (b) if you were served with the petition in the United States of America, within 35 days after that service,
- (c) if you were served with the petitioner anywhere else, within 49 days after that service, or
- (d) if the time for response has been set by order of the court, within that time.

(1) The address of the registry is: The Law Courts 800 Smithe Street Vancouver BC, V6Z 2E1
(2) The ADDRESS FOR SERVICE of the petitioners is: Geoffrey Trotter Law Corporation 1700 – 1185 West Georgia Street Vancouver BC V6E 4E6 Fax number for service of the petitioner: N/A E-mail address for service of the petitioner: gt@gtlawcorp.com
(3) The name and office address of the petitioners' lawyer is: Geoffrey Trotter Geoffrey Trotter Law Corporation 1700 – 1185 West Georgia Street Vancouver BC V6E 4E6

CLAIM OF THE PETITIONERS

Part 1: ORDERS SOUGHT

1. A declaration pursuant to the *Judicial Review Procedure Act* (“JRPA”) and s. 24 (or alternatively, s. 52) of the *Charter of Rights and Freedoms* (the “Charter”) that:
 - a. In respect of the order of the Provincial Health Officer (“PHO”) entitled “Gatherings and Events” dated September 10, 2021; October 25, 2021; November 16, 2021; and December 3, 2021; and variance dated November 12, 2021, and any replacements thereof, the following provisions:
 - i. Part D;
 - ii. The provision that the PHO “will not be accepting requests for a reconsideration of this Order, except from an individual on the basis of a

medical deferral to a vaccination with respect to an event or type of event” and that “A request for an exemption from providing proof of vaccination ... must follow the guidelines posted on my website.

(<https://www2.gov.bc.ca/gov/content/health/about-bc-s-health-care-system/office-of-the-provincial-health-officer/current-health-topics/covid-19-novel-coronavirus>)” which thereby incorporates by reference into the Gatherings and Events order:

1. “Public Guidelines for Request for Reconsideration (Exemption) Process affected by the Provincial Health Officer Proof of Vaccination Orders” dated November 12, 2021;
2. “Form for Reconsideration (Exemption) Process for the Public affected by the Provincial Health Officer Proof of Vaccination Orders” dated November 12, 2021; and
3. “Covid-19 Vaccine Medical Deferral” form dated October 28, 2021;

(collectively, the “Vaccine Exemption Protocol Documents”)

- b. In respect of the order of the PHO entitled “Food and Liquor Serving Premises” dated September 10, 2021; October 25, 2021; and variance dated November 12, 2021; and any replacements thereof, the following provisions:
 - i. Part B; and
 - ii. The “Suspen[sion of] reconsiderations [of] Parts B ... [except for] a request for reconsideration ... which request complies with the guidelines posted on the Provincial Health Officer’s website” which thereby incorporates by reference into the Food and Liquor Serving Premises order the Vaccine Exemption Protocol Documents.
- c. In respect of the order of the Chief Medical Health Officer of Northern Health, Dr. Jong Kim, dated November 30, 2021; December 9, 2021; and all previous versions thereof and any replacements thereof (the “Northern Health Order”), the following provisions:
 - i. Part I.

(collectively, the “Vaccine Passport Provisions”)

are of no force and effect as they unjustifiably infringe the rights and freedoms of the petitioners and others requiring medical exemptions guaranteed by sections 7 and 15(1) of the *Charter*, which rights are not accommodated in a constitutionally compliant manner by the Vaccine Exemption Protocol Documents. This declaration is suspended for two weeks from the date of pronouncement to permit the PHO the opportunity to enact replacements of the Vaccine Passport Provisions with amendments which cure the constitutional defects identified by the court;

2. An order pursuant to the *JRPA* and s. 24 (or alternatively s. 52) of the *Charter*:
 - a. in the nature of *certiorari* quashing and setting aside the Vaccine Passport Provisions to the extent of the unjustified *Charter* infringement declared under the previous paragraph, effective as of the date of the end of the suspension;
 - b. in the nature of *mandamus*, directing the PHO to:
 - i. announce to the public that the PHO will consider a Covid-19 vaccine exemption request from any member of the public on the basis that proceeding with Covid-19 immunization would seriously jeopardize the applicant's health, without limiting the grounds for such an exemption to any closed list of medical conditions, disabilities, or past vaccine reactions; and
 - ii. request that the British Columbia College of Physicians and Surgeons and the British Columbia College of Nurses and Midwives announce to their physician and nurse practitioner registrants that registrants are permitted to write an opinion letter in support of a patient's medical exemption from the Vaccine Passport Provisions in respect of any medical conditions, disabilities, or past vaccine reactions which the registrant in their clinical judgment believes in good faith means that proceeding with Covid-19 immunization would put the patient's health in serious jeopardy, even if the grounds for that jeopardy is not found on any list published by the PHO, and that by providing such an exemption opinion letter the registrant would not be committing professional misconduct or any breach of their ethical or regulatory duties;
3. An order pursuant to the *JRPA* in the nature of *certiori* quashing and setting aside the Vaccine Passport Provisions, including the Vaccine Exemption Protocol Documents as:
 - a. Exceeding the statutory authority of their enabling statute; and/or

- b. unreasonable;
- 4. Costs; and
- 5. Such further and other relief as the petitioners may seek and as this Honourable Court deems just and equitable.

Part 2: FACTUAL BASIS

Overview

1. This is a constitutional challenge to the Vaccine Passport Provisions only with respect to their unconstitutional failure to provide an effective, comprehensive, and accessible regime for medical exemptions. The lack of such accommodation discriminates against persons with disabilities whose medical conditions prevent them from safely receiving a Covid-19 vaccine. Although the remedy sought must be for the Vaccine Passport Provisions to be declared of no force and effect, the petitioners invite the court to provide a brief suspension of the declaration in order to provide time for the PHO to introduce amended versions of the orders which remedy the constitutional defect. The end result will be substantively the same vaccine passport regime as is now in place, but with a constitutionally compliant medical exemption regime.
2. All of the petitioners are supporters of public vaccination, both generally and with respect to Covid-19. They encourage their friends and family, who are not at elevated risk of an adverse reaction due to medical conditions and disabilities, to be fully vaccinated against Covid-19. Although the Canadian Constitution Foundation is opposed to domestic vaccine passports generally due to their discriminatory effect contrary to s. 15, and coercive effect contrary to s. 7, of the *Charter*, the most urgent defect in the current BC regime is its failure to provide constitutionally compliant medical exemptions. Accordingly, this particular constitutional challenge is not brought against the BC vaccine passport regime generally, but only with respect to its failure to provide constitutionally required medical exemptions to all who are constitutionally entitled to them.
3. Two of the individual petitioners (Sharon K [REDACTED] and Erika R [REDACTED]) eagerly received a first dose of Covid-19 vaccine in the second quarter of 2021 when doing so was entirely voluntary and optional, but suffered serious adverse reactions which required hospitalization and ongoing medical treatment.
4. The other individual petitioner (Veronica S [REDACTED]), has suffered severe and lifelong disabilities since birth, and has suffered significant adverse reactions to medications in the

past. She has concluded, after much consideration, that the risk of harm to her of contracting Covid-19 is outweighed by the risk of the harm to her from the Covid-19 vaccine itself. She has accordingly determined that her medical risk of remaining unvaccinated is lower than her medical risk of receiving the Covid-19 vaccine. She has accordingly not received a first dose. However, Ms. S [REDACTED] remains entirely supportive of her friends and family becoming vaccinated.

5. The Attorney General is named as the second Respondent in respect of the declaratory relief sought pursuant to the *Charter*.¹
6. It is not necessary for the petitioners to name the Chief Medical Health Officer of Northern Health as a separate Respondent because the Northern Health Order's provisions are incorporated by reference into the PHO orders at issue in this proceeding, and the PHO is already named as a Respondent.

The Government's Purposes, its evolving position on the requirement for medical exemptions, and its closed list of approved grounds for a medical exemption.

7. On August 23, 2021, Premier John Horgan and Minister of Health Adrian Dix announced that, commencing September 13, 2021, proof of vaccination against Covid-19 would become required for British Columbians to attend certain business, social, and recreational settings and events.
8. In all announcements of Premier Horgan, Minister Dix, and Provincial Health Officer ("PHO") Dr. Bonnie Henry up until September 8, 2021, they stated publicly that:
 - a. A goal of a vaccine passport regime was to incentivize British Columbians to be vaccinated; and
 - b. That there would be no medical or religious exemptions from the forthcoming vaccine passport requirement.
9. On August 30, 2021, the Litigation Director of the petitioner Canadian Constitution Foundation ("CCF") wrote to the BC government warning that the announced, but not yet implemented, vaccine passport policy was unconstitutional due to the lack of medical and religious exemptions.
10. Commencing on September 9, 2021, the public messaging from the province changed from one of no exemptions, to one recognizing that some people would be unable to safely

¹ *Beaudoin v British Columbia*, 2021 BCSC 248 at para. 6, and Response to Petition of the Respondents therein filed February 2, 2021 at para. 31.

receive a Covid vaccine due to “rare” medical contraindications, and that there would be a medical exemption process in place for such people.

11. The Vaccine Passport Provisions as enacted do not grant treating physicians the power to write letters which have the effect of exempting their patient from the vaccine passport requirements. Instead, the PHO has reserved to herself (and her Medical Health Officer delegates) the sole right to “approve” exemption ‘requests’ or ‘applications’ submitted as reconsideration requests under s. 43 of the *Public Health Act*. Thus, the Vaccine Passport Provisions grant the PHO “veto power” over the clinical judgments of doctors in respect of their own patients, and insert the PHO into that otherwise private relationship.
12. Under the September 10, 2021 and October 25, 2021 versions of the Vaccine Passport Provisions, it was possible for members of the public such as the petitioners to request reconsideration from the PHO either as to the structure of the Vaccine Passport Provisions, or for a patient-specific medical exemption. However, under the November 12, 2021 variance and the November 16 and December 9 versions of the orders, the PHO purported to quash all previously submitted reconsideration applications which had not yet been responded to, and refused to receive any further reconsideration requests apart from reconsideration requests which were compliant with a closed list of potentially qualifying conditions.
13. The individual petitioners suffer from disabilities and/or serious medical conditions (some caused by a first dose of Covid-19 vaccine) by which their health would be seriously jeopardized for them to receive a (first or second) dose of Covid-19 vaccine. The petitioner R [REDACTED] is eligible to apply for an exemption, but only on an activity-by-activity basis (i.e. the PHO is refusing to even consider granting a full exemption to treat Ms. R [REDACTED] as if she had been able to safely receive all doses). The petitioners K [REDACTED] and S [REDACTED] cannot even apply for an exemption because their disabilities are not listed on the approved PHO list, and doctors are all but prohibited from providing supportive opinion letters, for the reasons next described.

The province has told doctors not to provide exemption letters for conditions which are not on the PHO’s approved list of conditions

14. Doctors are unwilling to provide letters in support of a medical exemption due to warnings made against them by the BC College of Physicians and Surgeons, in co-ordination with the PHO, as follows:

- a. On September 15, 2021, two days after the Vaccine Passport Provisions went into effect, the PHO published a 1-page document titled “Valid contraindications and deferrals to COVID-19 vaccination”;
- b. On the same day, the BC College of Physicians and Surgeons published a document titled “Guidance re: valid contraindications and deferrals to COVID-19 vaccination.” In this document:
 - i. the College provided a link to the PHO publication referenced in the previous subparagraph which the College described as “the Provincial Health Officer has recently published guidance on valid contraindications and deferrals to vaccination. There are very few acceptable medical contraindications to the COVID-19 vaccination. It may be helpful to share this guidance with your patients so that they understand what constitutes a legitimate medical condition that warrants a medical certificate”; and
 - ii. the College referenced and linked to its Practice Standard on “Medical Certificates and Other Third-party Reports” which warns registrants that “The College may consider the provision of untruthful information ... in ... medical certificates or reports as professional misconduct.”
- c. Subsequently, on October 15, 2021, the BC College issued a publication titled “How to verify a legitimate COVID-19 vaccine exemption or deferral” which stated that “According to the provincial health officer, the reasons outlined in the deferrals to COVID-19 vaccination table are the only valid reasons for a COVID-19 exemption or deferral. Legitimate exemption or deferral letters must state one of these valid reasons.” The underlined text linked to a version of the PHO’s “Covid-19 Vaccine Medical Deferral” form which contained a closed list of “Medical reason(s) for temporary deferral.”
- d. The foregoing were received by registrants subsequent to a "Joint Statement on Misleading COVID-19 Information" issued by the BC College and the First Nations Health Authority issued on May 6, 2021, which expressed “concern ... about reports that some BC physicians are spreading information that contradicts public health orders and guidance” and stating that “Public statements from physicians that contradict public health orders and guidance are confusing and potentially harmful to patients ... Those who put the public at risk with misinformation may face an investigation by the College, and if warranted, regulatory action.” Although the joint statement, literally interpreted, allows for the

possibility that some contradiction of PHO guidance by doctors might not constitute a disciplinary offence, the thrust of the joint statement is to equate the two, and subsequent public disciplinary action taken against certain doctors for merely alerting the public to Covid-19 vaccine adverse reactions they had personally observed has resulted in disciplinary proceedings being commenced against them.

15. As a result of the chill of these threats instigated by the College at the behest of the PHO and the province, the petitioners S [REDACTED] and K [REDACTED] cannot even obtain a doctor's letter in support of an exemption, because their disabilities are not on the PHO's list of conditions 'approved' for medical exemption. As a result, they have been denied the opportunity to even apply to the PHO for a medical exemption.
16. Under the Vaccine Exemption Protocol Documents introduced pursuant to the November 12th Variance, the PHO will no longer even consider granting the petitioners and others like them a general medical exemption from the Vaccine Passport Provisions. Instead, the PHO will only consider an activity-specific exemption request. The guidance document specifies no time period for a decision on an exemption request, even though some exemption requests (such as to attend a funeral reception) may be time-sensitive and of extreme personal importance. The application form requires the applicant to describe the proposed activity or event, its date and city, its number of participants, the impact of exclusion on the applicant, why alternatives (such as virtual attendance and ordering take-out, according to the accompanying guidance document) are not sufficient, and either attaching a letter from a medical health officer confirming that "I have been informed by a medical health officer that I should not receive additional doses of a COVID-19 vaccine at this time due to an adverse event following immunization" or submitting "a completed COVID-19 Vaccine Medical Deferral form that has been filled out by a medical practitioner." This is the same Covid-19 Vaccine Medical Deferral form which the BC College of Physicians and Surgeons has informed registrants they may sign only if the applicant's condition is on the approved PHO list, failing which they may be disciplined for professional misconduct.

The petitioners' disabilities / medical conditions which prevent them from safely receiving a Covid-19 vaccine

17. The PHO, through the BCCDC's regular publications on vaccine safety, recognizes a small but statistically recognized incidence of severe reactions to the Covid-19 vaccine of types other than those reflected on the PHO's closed list of accepted reactions, including seizures and various conditions representing long term or permanent nervous system damage up to and including paralysis (Bell's Palsy², transverse myelitis, Guillain-Barré syndrome).
18. Following her first dose of Pfizer Covid-19 vaccine, the petitioner Sharon K [REDACTED] was ultimately diagnosed with brachial neuritis with scapular winging, a neurological condition comprising extreme pain and partial paralysis of the affected area (in her case, primarily her right – dominant – arm). Even today, seven months after her first dose of vaccine, Ms. K [REDACTED] still experiences chronic pain, significantly reduced strength which significantly interferes with the activities of daily living, sleep, and employment. Ms. K [REDACTED]'s compromised arm function is of particular concern as she is pregnant and will need to care for a newborn within the next two months. Despite all this, BC Public Health has nonetheless advised Ms. K [REDACTED] to proceed with a second dose, even though her doctors are unable to assure her that a second dose will not result in a repeat, or worsening, of her brachial neuritis, which could cause her further or permanent nerve damage, and could potentially impact her baby.
19. Following her first dose of covid vaccine, the petitioner Erica R [REDACTED], a lifelong competitive swimmer and recent swim coach, developed physician-diagnosed pericarditis, which required hospitalization and a lengthy period off work. She recently suffered had a relapse of her pericarditis. Although pericarditis is on the approved PHO list, the PHO will not even consider granting a general vaccine passport exemption, but only activity-by-activity exemptions. This makes the exemption regime largely illusory to her.
20. The petitioner Veronica S [REDACTED] was born with spina bifida and hydrocephalus. She has undergone over 15 surgeries, some of them with very poor recoveries, and has reacted badly to various medications throughout her life. She is also suspected of suffering from a scarring disorder. Because of her complex and overlapping disabilities and past reactions to medications, and the fact that the approved Covid-19 vaccines have not been tested on persons with disabilities like her own, she has concluded that receiving the vaccine is too

² Which causes partial paralysis of the face that can last for months.

risky for her. No doctor will even consider writing her a letter as her disabilities are not on the approved PHO list.

The impacts of the impugned provisions on the petitioners

21. Because of their inability to safely become fully vaccinated, the petitioners are excluded from many crucial aspects of social and community life. They cannot attend birthday or anniversary celebrations in restaurants, cannot attend weddings, are excluded from work social functions and craft fairs, are not permitted at gyms, can no longer volunteer in numerous contexts, and are unable to attend even personal gatherings (even at Christmas). These are highly impactful social exclusions, which in turn impact their mental health.
22. The injustice of the petitioners' social exclusion adds to their suffering, since their inability to receive the Covid-19 vaccine is due to their medical conditions and disabilities, which are beyond their control.
23. Ms. K [REDACTED] in particular will need to more or less raise her baby in complete social isolation.

Part 3: LEGAL BASIS

Petitioners entitled to proceed directly to judicial review as no reconsideration available

24. The November 12, 2021 Variance and the subsequent orders exercise the PHO's power under s. 54(1 (h) of the *Public Health Act*, and the emergency powers set out in Part 5 of the *Act*, to not accept requests for reconsideration of the substantive provisions of the impugned orders. As the relief sought in this proceeding is not available through statutory mechanisms, there is no adequate statutory remedy available to the petitioners, who are entitled, and required, to proceed directly to judicial review.

Standing

25. All of the individual petitioners have personally suffered the unconstitutional impact of the impugned provisions and have standing as of right.
26. The petitioner Canadian Constitution Foundation asserts public interest standing on the basis that:
 - a. It has a genuine interest in the outcome of this proceeding;

- b. It is unreasonable to expect disabled British Columbians, in the middle of a pandemic and its public health restrictions which imposes stark personal and social disadvantages and disproportionately impacts their material, physical, and emotional resources, to marshal the knowledge and resources needed to bring this systemic constitutional challenge which manifestly raises a serious justiciable issue; and
- c. CCF's involvement therefore facilitates meaningful access to justice for vulnerable and marginalized citizens affected by the impugned orders.

Evidence

27. As the impugned provisions of the Vaccine Passport Provisions were enacted or re-enacted on November 12 and November 16, 2021, the record of proceeding on this judicial review is the evidence which was before or available to the PHO as of November 11, 2021. The petitioners are adducing the evidence which was, to their knowledge, before the PHO at the time she made those decisions. The PHO has a statutory duty pursuant to the *JRPA* to reconstruct and file as affidavit evidence with the court the rest of her "record of decision."

The impugned provisions discriminate against the petitioners on the basis of disability contrary to 15 of the *Charter*

28. Both branches of the test for a s. 15 *Charter* infringement are made out in this case.

- a. Differential impact/distinction: The petitioners have physical disabilities – either pre-existing, or caused by a first dose of Covid-19 vaccine. The Vaccine Passport Provisions create a distinction on the basis of these disabilities by denying the petitioners access to numerous locations and events which they would otherwise have the lawful right to enter and participate in. The Vaccine Exemption Protocol Documents do not eliminate this distinction with respect to the petitioners and those like them because:
 - i. They give no relief whatsoever to the petitioners S [REDACTED] (and, in practice, K [REDACTED]), whose conditions are not on the PHO's approved list of grounds for a medical exemption and who are therefore excluded from even applying for an exemption due to the inability to even obtain a supportive doctor's letter in BC; and

- ii. Even for those such as the petitioner R [REDACTED] whose condition is on the PHO's list, the impugned provisions still create a distinction on the basis of her disability because she is not granted a general exemption and treated the same as a fully vaccinated person, but is presumptively excluded from all vaccine-passport-required venues and events unless she obtains specific permission from the PHO to attend a particular venue or event. She is not treated as a free citizen entitled to direct her own life within the limits of the general law, but is rather treated as a ward of the state who must ask the PHO or her delegate for permission for each place she wants to go, or person she wants to see.
- b. Substantive discrimination: The impugned provisions fail to respond to the actual capacities and needs of persons whose disabilities prevent them from receiving a full course of covid-19 vaccine. The impugned provisions instead impose burdens on them in a manner that has the effect of reinforcing, perpetuating, or exacerbating their disadvantage. Disabled persons already face societal discrimination and exclusion. The under-inclusive and ineffective medical exemption provisions in the Vaccine Passport Provisions adds further societal exclusion to the exclusion and hardship which the individual petitioners already suffer as a result of the interaction of their underlying disabilities and medical conditions during a period of a global pandemic.

The impugned provisions imperil the security of the person, and even lives, of the petitioners in a way which is overbroad, contrary to s. 7 of the *Charter*

- 29. The purpose, or one of the purposes, of the Vaccine Passport Provisions is to incent (or alternatively: pressure, or coerce) vaccination. This purpose, and the Vaccine Passport Provisions, thereby engage the security of the person interest of those who, like the petitioners, have disabilities which place them at risk of serious adverse reactions to the Covid-19 vaccine, requiring hospitalization, and potentially resulting in long term or even permanent disability. For those whose disability-related adverse reactions risk death, their life interest is also engaged.
- 30. The security of the person and life interests of the petitioners are also engaged by the PHO's fettering of the clinical judgment of doctors, by coordinating communications with doctors' regulator to threaten professional discipline, thereby making it impossible for

patients with conditions left off the approved PHO list to even obtain a doctor's letter in support of an exemption application. This engages the security of the person rights of disabled persons whose conditions are off the list, by pressuring (or alternatively coercing) vaccination even for those for whom it is dangerous. It also places patients like the petitioners in a catch-22 where they cannot even put a doctor's evidence of their medical contradiction before the court (or the PHO). Prohibiting doctors from writing exemption letters for documented - but not yet PHO-acknowledged - medical contraindications, endangers the health (and thus security of the person) of the petitioners and public health generally. When initially approved by Health Canada, it was unknown that the mRNA (Pfizer and Moderna) vaccines had a low, but statistically significant, risk of causing myocarditis and pericarditis; it was similarly initially unknown that the Astra Zeneca and Johnson & Johnson vaccines carried low, but statistically significant, risks of fatal blood clots. Such risks became recognized by Health Canada and the PHO only after reports by doctors of adverse reaction. Yet by fettering doctor's clinical judgment, the impugned provisions prohibit doctors from writing exemption letters for emerging medical contraindications, thereby endangering the health of the petitioners and public health generally. If the impugned provisions had been enacted in the first half of 2021, it may have well delayed the public recognition of emerging risks with Covid-19 vaccines, and would certainly have resulted in some patients receiving these vaccines who could have been warned of contraindications to them by their treating physician. Respecting the clinical judgment of treating physicians is essential to safeguarding the security of the person of all patients.

31. The petitioners' s. 7 interests are engaged in a way which offends the principles of fundamental justice. In particular, the impugned provisions' engagement of the petitioners' security of the person and life is arbitrary, overbroad, and grossly disproportionate. The petitioners rely on the arguments set out in other portions of this petition which are referable to this issue, as follows:
 - a. Arbitrariness: the petitioners incorporate by reference their arguments on lack of rational connection under s. 1 at paragraph 38 below;
 - b. Overbreadth: the petitioners incorporate by reference their arguments on minimal impairment under s. 1 at paragraphs 39-40 below; and
 - c. Gross disproportionality: the petitioners incorporate by reference their arguments on proportionality under s. 1 at paragraph 41 below.

The impugned provisions are not reasonably justified under s. 1 of the *Charter*

32. In light of the holding in *Beaudoin v. British Columbia*, 2021 BCSC 512, this argument will proceed on the basis that the *Doré* framework applies to the government's burden to justify the impugned provisions under s. 1 of the *Charter*. If, however, the Court of Appeal reverses that holding (on the basis that the impugned orders are akin to laws of general application to the entire population) the s. 1 analysis in this case would then need to be conducted on the *Oakes* test, which would only render it more difficult for the government to justify the infringement.
33. Where, as here, an infringement of the petitioners' *Charter* rights has been shown, government bears the onus of proof under the *Doré* framework to demonstrably justify the PHO's decision to impose the orders in their current form on the basis that they proportionately balance the petitioners' *Charter* rights with the PHO's statutory objectives.
34. The Supreme Court of Canada has been clear that the *Doré* framework "works the same justificatory muscles" as the *Oakes* test. Under *Doré*, as under *Oakes*, the orders can be upheld only if the government establishes, with evidence, that they are minimally impairing of the petitioners' s. 15 and s. 7 rights, and that the harm which they inflict on the petitioners' constitutional rights is proportionate to the orders' public benefit which the PHO is charged to pursue under the *Public Health Act*.
35. The true purpose of the Vaccine Passport Provisions is, as stated repeatedly by the PHO and other government officials, and as admitted in preamble R of the November 12th variance and the November 16th G&E order, that "Programs that require that proof of vaccination be provided have been shown to increase vaccination uptake in populations." That is, the true purpose of the Vaccine Passport Provisions is to incent (or, to be put it more bluntly, to coerce) vaccine uptake.
36. The true purpose of the impugned provisions is not the reduction of transmission generally. This is clear from the following:
 - a. Proof of vaccination requirements in the orders is imposed not on the basis of the level of transmission risk, but rather on the basis of whether or not the PHO considers the activity to be discretionary vs. essential. So, for example, proof of vaccination is not required for vaccine-aged children attending school (the PHO specifically stated at her October 5 press conference that this was because schools

pose a “low risk” of transmission), but is required for eating on an outside restaurant patio where the transmission risk is even lower;

- b. That the PHO permits unvaccinated *employees* to be present in a space (such as a restaurant), despite requiring *patrons* to provide proof of vaccination to attend in that same location; and
- c. Comments attributed to the PHO confirm that the Vaccine Passport Provisions are focused on incentivizing vaccination, rather than reducing transmission directly by removing potentially infectious persons from specified locations or events.

- 37. To restrict access to “discretionary” activities purely to “incent” (or coerce) vaccination generally is clearly not constitutionally valid when applied to persons whose health would be imperiled by complying, such as the petitioners.
- 38. There is no rational connection between unduly restricting access to medical exemptions, and incentivizing vaccination. Those with medical contraindications will not receive the vaccine because, if they are forced to choose between their health and their ability to participate in the same activities as their family, friends, and other associates, they will choose their health. That is the evidence before the court from the petitioners. The only effect of the Vaccine Passport Provisions on such persons is to impose a burden on them due to their disability. This does not advance the government’s objective of incenting vaccination. In fact, it undermines it because if a person succumbs to the pressure created by the Vaccine Passport Provisions and is vaccinated despite their medical contraindication, it seriously jeopardizes, rather than improves, their own health, and places avoidable further demand on the already strained public health system. The PHO’s general statutory mandate is to protect public health; incenting vaccination for those who ought not to be vaccinated due to their rare medical risks and disabilities undermines, rather than furthers, that statutory objective. In addition to constituting a *Charter* infringement, this aspect of the Vaccine Passport Provisions fails the reasonableness requirement as a matter of pure administrative law on judicial review.
- 39. The impugned provisions are not minimally impairing of the petitioners’ equality rights for the same core reason as they are discriminatory in the first place as set out at paragraph 21.a: they fail to grant full exemptions to those who are not on the PHO’s approved list, even though persons like the petitioners are prevented from receiving a Covid-19 vaccine for the same reason as those on the PHO’s approved list: a medical contraindication.
- 40. The impugned provisions suffer from further minimal impairment deficits:

- a. The existing exemption procedure itself is far too burdensome. There are less impairing options available. The impugned provisions arrogate to the PHO veto power to approve every single exemption request. By this approach, the PHO departs from public health considerations of populations, and intrudes deeply upon the sacrosanct physician-patient relationship of the individual petitioners and those like them. Both the Ontario and Quebec vaccine passport regimes, and the federal ‘planes and trains’ vaccine requirement, respects physicians’ authority to ‘unilaterally’ issue of medical exemption letters to their patients in cases of *bona fide* medical contraindication, with no requirement for government approval and no opportunity for a government veto. Such letters are legally effective to grant access to an otherwise vaccine-passport-controlled venue or event, without a requirement of prior PHO approval. Minimal impairment requires BC to do the same, or alternatively to do so for at least the conditions on its current approved list (anaphylaxis, pericarditis, myocarditis, and other listed conditions) with a right to apply to the PHO for a medical exemption in respect of any *unlisted* condition which the treating physician considers would seriously jeopardize the patient’s health to receive a covid vaccine but which are not already on the PHO’s list.
- b. It cannot be minimally impairing for the PHO to fetter the clinical judgment of doctors, by coordinating communications with the regulator to threaten professional discipline, thereby making it impossible for patients with conditions left off the approved PHO list to even obtain a doctor’s letter, which is a requirement to even *submit* an exemption application (or to put the evidence before the court). This places patients such as S [REDACTED] and K [REDACTED] in an unconstitutional catch-22 which makes the exemption protocol entirely illusory for those British Columbians who have an unlisted condition. The straitjacket created by the Vaccine Passport Provisions and the government’s conduct is entirely unnecessary. This is no reason why the Vaccine Exemption Protocol Documents cannot include a general category for “any other medical condition or disability which, in the medical practitioner’s *bona fide* clinical opinion, creates the risk that receiving a Covid-19 vaccine would seriously jeopardize the applicant’s health.”
- c. The impugned provisions fail to recognize exemptions granted pursuant to vaccine passport orders in other provinces. There is no reason to compel persons who are ordinarily resident in other provinces and have gone through the onerous process of

obtaining an exemption in accordance with their home province's vaccine passport order, to lose that constitutional protection when they cross a provincial border in order to work or visit family in British Columbia. It is impractical to expect persons who must travel for their business or employment to perform duplicate exemption applications in every province they must cross. It is inhumane to exclude someone resident from another province from attending, for example, a parent's funeral reception in BC, which will often be on short notice which prevents the possibility of obtaining a BC PHO exemption in time.

41. The harm inflicted on the petitioners' constitutionally protected rights is disproportionate to their public health benefit of the impugned orders, for at least the following reasons:

1. The province has publicly recognized that the incidence of disabilities which will require medical exemptions, will be "rare" (preamble V to the Nov 16 G&E order states that "very few people fall into this category"). That being the case, amending the orders to provide an effective, comprehensive, and accessible exemption regime to the very few people who need it will not materially impair the government's purposes of protecting public health by incenting vaccination (if such a purpose is constitutionally permissible in the first place). The petitioners, if granted general vaccine passport exemptions, will still be subject to the same public health requirements, such as masking and social distancing, which apply to all other persons.
2. Even if a person has a condition on the approved PHO list, such as Ms. R [REDACTED], the requirement to obtain separate permission for each event and location is unduly burdensome. The practical effect is that most persons will suffer the exclusion of the orders rather than deal with the requirement to convince a bureaucrat to approve every single outing. This is not how things are supposed to work in a free and democratic society.
3. The nature of the discriminatory harm to the petitioners is of great weight. For S [REDACTED] and K [REDACTED], they are entirely excluded from restaurants, indoor recreation facilities, cultural venues, and many other locations as patrons. They are permitted to attend such venues only to cook, serve, and clean as employees. The impugned orders segregates and marginalizes the already disadvantaged on the basis of

disability – an appalling result in a society that claims to be increasingly aware of social injustice.

4. The government's failure to provide accessible and complete medical exemptions is having a ripple effect for the petitioners within the private sector, which is compounding the disproportionate harm. Ms. R [REDACTED], for example, was dismissed from her employment on the basis of not having received a complete course of Covid-19 vaccine, even though no PHO order or other law required vaccination to be a paid swim coach, and even though neither her employment contract nor her employer's written policies required vaccination. Having already lost the opportunity to meet with friends and extended family due to her vaccination status, she has now lost her only other opportunity to see people outside her household in person in otherwise controlled venues.
5. Incidents of medical exemptions on the basis of physical disability as sought in this petition, will be evenly distributed throughout the population. Respecting the constitutional rights of the petitioners and those like them will make an enormous difference in the life of the petitioners, but will not pose the public health risk identified in preamble CC(a) to the November 16 G&E order regarding "some age groups and some communities where vaccination rates continue to be low... continues to pose a risk to the health of the population, and constitutes a health hazard." That is, making the medical exemption regime comprehensive, effective, and accessible will not result in no 'clumping' of unvaccinated persons.
6. For those with heightened risks of an adverse reaction, and especially for medically complex people such as Ms. S [REDACTED], the choice to get vaccinated involves making deeply personal trade-offs about their own health. Informed consent is the touchstone of the law in this area, recognizing that it is for the individual, not their doctor or the government, to decide how much of a treatment or prophylactic risk to run in pursuit of reducing other risk (here, contracting or transmitting Covid-19).
7. Alternatively, if certain British Columbians will elect, despite being medically contraindicated for the Covid-19 vaccine, to nonetheless be vaccinated, it would not be on the basis of meaningful consent, but on the basis of the coercive effect of under-inclusiveness of the medical exemption regime, and the harm which the person would suffer from exclusion from public spaces, which is itself an unconstitutional effect (both by constituting substantive discrimination contrary to

s. 15, and to jeopardizing their security of the person and life contrary to s. 7) for persons whose medical conditions and disabilities place them at heightened risk of receiving the vaccine. It is one thing for government to coerce the ‘consent’ of members of the general population who are at low risk of adverse reactions to the covid vaccine; it is quite another thing for government to coerce those who are at heightened risk of an adverse reaction.

8. The mere fact that the impugned provisions may prevent *some* Covid-19 transmission should not suffice to justify a blanket ban on persons in the position of S [REDACTED] and K [REDACTED] whose conditions are not on the approved list. Some degree of Covid-19 transmission risk from unvaccinated persons is already present in vaccine passport venues and events both through attendee fraud (fraudulent QR codes are publicly available online) and through the presence of unvaccinated persons who are expressly permitted by the orders (e.g. employees). Even vaccinated persons pose some transmission risk, albeit at lower rates. The complete exemption ban for the petitioners who are not on the PHO’s approved list cannot be justified simply on the basis of some small and unspecified reduction in Covid-19 transmission risk. The proportionality prong of the s. 1 analysis demands more than rational connection – it requires the government to demonstrably justify, with evidence, that the beneficial impacts of the impugned orders outweigh their constitutional harms to the petitioners. The court here is not simply asking whether there is *any* evidence in support of the orders as it might under typical administrative law review for reasonableness; the court is conducting a constitutional review which, at a minimum under *Doré*, “‘works the same justificatory muscles’ as the *Oakes* test.”
9. This is not a case of public health vs. constitutionally protected civil liberties. The cost borne by the petitioners are not only the loss of their civil liberties, but of their health as well. Thus, the petitioners’ health weighs on both sides of the scales. The discriminatory impact of the impugned orders harms the petitioners’ health in the name of protecting it, either because:
 - a. For those persons like the petitioners who hold firm against the pressure of the Vaccine Passport Provisions, and are thereby denied in-person interactions and relationships in a host of scenarios, their mental, emotional, relational, and spiritual health suffers – a harm which the PHO has

confirmed is one of the key harms of the pandemic itself. While the Vaccine Passport Provisions permit most British Columbians to choose to be vaccinated in order to achieve re-admittance to those venues and relationships, it denies those benefits to the petitioners through no fault of their own, due only to their physical disabilities which prevent them from safely being vaccinated; or

- b. For those disabled persons who succumb to the pressure of the Vaccine Passport Provisions and seek vaccination in order to gain equal access to regulated spaces, their health is seriously jeopardized through a vaccination which is dangerous for them.

The government's evidentiary burden

- 42. The petitioners bear the burden of proof only for establishing an infringement of s. 15 and s. 7. If the government seeks to justify these *Charter* infringements under s. 1, it bears the evidentiary and legal burden under s. 1, under either *Doré* or *Oakes*.
- 43. In doing so, the government must demonstrably justify the *Charter* infringement. This requires evidence not just of general government intentions, or possible qualitative outcomes, but of the actual numbers in support which the PHO considered in issuing the orders. Without such evidence, the court would be unable to find that the government had satisfied its proportionality burden. For example:
 - a. It would be insufficient for government to adduce evidence that the impugned provisions might increase vaccination rates in general (which would at most establish a rational connection); government must actually quantify the alleged increase in vaccinations arising from the lack of an effective medical exemption regime, and quantify how much this increase in vaccinations can reasonably be expected to reduce Covid-19 infections or hospitalizations.
 - b. The November 12th variance claims in preamble S that “There are difficulties and risks in accommodating persons who are unvaccinated, since no other measures are nearly as effective as vaccination in reducing the risk of contracting or transmitting SARS-Co-2, and the likelihood of severe illness and death.” If government seeks to justify the s. 15 infringements on this basis, it must again adduce not just general evidence that unvaccinated persons pose a greater risk of transmission than vaccinated persons, but to quantify the increased risk, if all other public health

restrictions are followed. In particular, it must adduce evidence of how much Covid-19 transmission has occurred at vaccine passport venues and events due to the presence of persons who are not fully vaccinated on the basis of a previously-recognized medical exemption, which justified the change in policy in the November 12th Variance. It must also adduce evidence about why such increased transmission is the result of the presence of medically exempted persons *per se*, rather than a mere failure to enforce public health requirement of general application such as masking (if the cause of transmission was lack of enforcement of existing public health restrictions, the minimally impairing and proportionate response is not a ban on medical exemptions for those off the PHO's list, but is enforcement of existing public health restrictions). Such evidence is necessary for the government to demonstrably justify the differential treatment of the petitioners in both ways identified in para. 21.a above.

- c. The government's quantification of the public harm which would flow from respecting the constitutional rights of the petitioners should be focused on the risk of hospitalization and death of the vaccinated population. Vaccination rates for the most at-risk populations (particularly, elderly persons) is very high. Those in younger age groups who choose not to be vaccinated as a matter of choice, rather than a matter of disability, have accepted the risk of becoming infected with Covid-19 and do not require the government's "protection" through denying the constitutional rights of the petitioners. It is the additional risk to high-risk vaccinated groups posed by respecting the medical exemption rights of the petitioners which the government must attempt to quantify in its evidence. Those who would be at greatest risk of Covid-19 infection (e.g. the elderly) are generally in the sub-populations with the greatest vaccine uptake. The government's evidence would need to show that the presence of an unvaccinated petitioner in a restaurant, for example, would pose a greater risk of transmission than the presence of unvaccinated employees, which the Vaccine Passport Provisions expressly permit.
- d. The government must adduce evidence to justify why British Columbia cannot follow the doctor-respecting regime which is in place in Ontario and federally. Merely pointing to the fact that some doctors have issued fraudulent exemption letters is not enough, both conceptually (that is a matter easily addressed by existing professional discipline machinery) and quantitatively (the government has

the burden of proof of establishing, with evidence, that there is greater exemption letter fraud in Ontario than QR code fraud in BC; both lead to transmission risk of unvaccinated persons being present in supposedly vaccinated-only zones). If the BC government seeks to justify the PHO-veto regime which it has enacted, it must adduce evidence of how much Covid-19 transmission and hospitalization its more stringent policy can reasonably be believed to have prevented.

- e. Although the preambles to the orders state the PHO's view that asymptomatic testing is not an ideal substitute for vaccination *in general*, the petitioners say that it is a sufficient substitute for vaccination in the "rare cases" of medical inability to safely receive the vaccine; if government is of a different view, it must adduce the evidence before the court to support its position.

44. Government must provide significant evidence if it seeks to justify its co-ordination with the physicians' regulator to threaten doctors with professional discipline should they write an exemption letter for a patient whose disabilities are not yet on the PHO's list.

Obviously, if BC doctors write exemption letters for patients who do not actually have a medical contraindication, this would be fraudulent and subject to discipline. But in order to justify the straitjacket which the PHO has asked the college to place on doctors to write a letter for no condition other than those listed, requires demonstrable justification with evidence of a harm specific to letters for other *bona fide* contraindications. It is difficult to imagine the government having such evidence, but if it exists, government must put it before the court if it seeks to justify its conduct.

Part 4: MATERIAL TO BE RELIED UPON

- 1. Affidavit #1 of Sharon K [REDACTED] made December 18, 2021;
- 2. Affidavit #1 of Joanna Baron made December 21, 2021;
- 3. Affidavit #1 of Erica R [REDACTED]; and
- 4. Affidavit #1 of Veronica S [REDACTED]

The petitioner estimates that the hearing of the petition will take two days.

Date: December 22, 2021



Signature of Geoffrey Trotter
lawyer for petitioners